

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
CHARLESTON**

**ANDREW MILLER,**

**Plaintiff,**

**v.**

**Case No. 2:14-cv-16868**

**DAVID BALLARD, et al.,**

**Defendants.**

**PROPOSED FINDINGS AND RECOMMENDATION**

This matter is assigned to the Honorable Joseph R. Goodwin, United States District Judge, and it is referred to the undersigned United States Magistrate Judge for submission of proposed findings and a recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). Pending before the court is the defendants' Motion to Dismiss (ECF No. 21).

**RELEVANT PROCEDURAL HISTORY**

On May 23, 2014, the plaintiff filed his initial Complaint (ECF No. 1), which named Jim Rubenstein, David Ballard, David Miller, Captain Matheny and "John Doe" as defendants. The identified defendants were served with process and timely filed an Answer (ECF No. 20) and a Motion to Dismiss (ECF No. 21) on October 29, 2014.

On November 13, 2014, the plaintiff filed a Response to the Motion to Dismiss (ECF No. 25), but also filed a Motion for Leave to File an Amended Complaint (ECF No. 26). The plaintiff submitted two proposed Amended Complaints (ECF No. 26, Attach. 1 and ECF No. 38), the latter of which was filed on December 12, 2014.

During a status conference held on July 13, 2015, the undersigned discussed the proposed amendments with the parties on the record, and advised the parties that the court will permit the amendments as addressed in the second proposed Amended Complaint, filed on December 12, 2014. (ECF No. 38). A separate Order granting the plaintiff's Motion for Leave to File Amended Complaint (ECF No. 26) has been entered, and service of process upon the new defendants identified in the Amended Complaint will occur in short order, with responses to the Amended Complaint by all defendants being due in accordance with the Federal Rules of Civil Procedure, or other order of this court.

### **RECOMMENDATION**

In light of leave being granted to the plaintiff to amend his Complaint, and new responses to the Amended Complaint being required of all of the defendants named therein, it is respectfully **RECOMMENDED** that the presiding District Judge **DENY WITHOUT PREJUDICE** the pending Motion to Dismiss (ECF No. 21), enabling the defendants to re-file any such motion after service upon the new defendants.

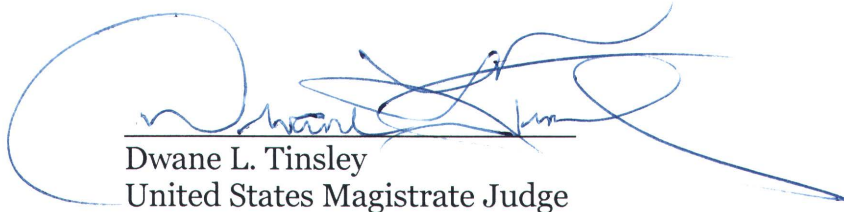
The parties are notified that this Proposed Findings and Recommendation is hereby **FILED**, and a copy will be submitted to the Honorable Joseph R. Goodwin, United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(d) and 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen days (filing of objections) and then three days (service/mailling) from the date of filing this Proposed Findings and Recommendation within which to file with the Clerk of this court, specific written objections, identifying the portions of the Proposed Findings and Recommendation to which objection is made,

and the basis of such objection. Extension of this time period may be granted by the presiding District Judge for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the district court and a waiver of appellate review by the circuit court of appeals. *Snyder v. Ridenour*, 889 F.2d 1363, 1366 (4th Cir. 1989); *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Wright v. Collins*, 766 F.2d 841, 846 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984). Copies of such objections shall be served on Judge Goodwin.

The Clerk is directed to file this Proposed Findings and Recommendation, to mail a copy to the plaintiff and to transmit a copy to counsel of record.

July 14, 2015



Dwane L. Tinsley  
United States Magistrate Judge